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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 386

NATIONAL LEAD COMPANY, A CORPORATION,

Petitioner,

vs.

MAX SCHUFT, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

Respondents' "Statement of Facts" is misleading. As hereinafter used, an Arabic numeral will indicate pages of the record certified to this Court.

At Pages 2 and 3 of Respondents' brief appears statements as to large numbers of open flames in Petitioner's plant. It was undisputed that on the morning of the fire the only flames to which there was atmospheric access were in two furnaces on the ground floor and three gas flames under the driers, all of which were on the ground floor (68, 141).

There was no evidence to support the statement at Page 8 of Respondents' brief to the effect that there would be no flash or explosion from the ignited wood. On the contrary, it was undisputed that wood was at least as inflammable as the lignitic humus (44, 109-110).

The record does not support the statement at Page 4 of Respondents' brief that "on the morning of the fire the air was full of humus lignite dust." With one exception the witnesses all testified that on the morning of the fire there was no humus dust in the air (57, 62, 69, 78). Only one witness testified to seeing such dust in the air that morning, and he stated that there was a small amount (27-28). Also at Page 4 of Respondents' brief is a statement that at the start of the fire it "was not confined to any particular place but was all over." This was not the evidence. The witness who first saw the fire said: "It seemed to be at the top part of the building . . . As far as I could see it was all at that top story . . . It seemed to come up and through the center of the roof . . ." (28).

REPLY TO RESPONDENTS' ARGUMENT

Respondents in substance contend that all that Petitioner urges is a review of fact questions.

This is not correct.

As shown by our Petition and Brief, the vital question is whether the Court of Appeals correctly construed and applied the local law, established by South Dakota Supreme Court decisions, that where in a civil case a litigant relies on circumstantial evidence, he can prevail only if the circumstances shown are consistent with his contention, and inconsistent with any other rational theory, and with the asserted conclusion proved to a reasonable certainty.

The Court of Appeals professed to follow this rule, but clearly did not do it. After citing the rule, the Court of Appeals' decision proceeds in effect to emasculate it.

As Respondents seem to concede at Page 7 of their brief, the ultimate result of the Court of Appeals' decision is that the South Dakota rule is met if under the circumstances shown the asserted contention is "within reason." This is obviously something different than establishing such conclusion to a reasonable certainty, and excluding every other rational theory.

To say that it is enough if the conclusion is "within reason" only follows the South Dakota rule part way. It ignores the

vital feature of excluding every other rational theory. It, further, and under the direct holding of the Court of Appeals' decision, relieves the proponent of excluding every other rational theory, and places on the adverse party the burden of establishing some other rational theory.

As to whether this conclusion is one of substantive or adjective law, reference is made to the masterly opinion of Judge Wham of the District Court of the Eastern District of Illinois, in *Francis v. Humphrey*, 25 Fed. Supp. 1. The conclusion there reached, on unassailable logic, is that where the local law places on a plaintiff in a personal injury action the burden of proving freedom from contributory negligence, this is a rule of substantive, rather than of adjective, law. This is directly applicable here.

The gist of the question presented is whether the Court of Appeals has actually followed the local law when the inescapable effect of the decision is that a vital part of the local rule is eliminated. The decision cannot be reconciled with the late pronouncements of the South Dakota Supreme Court in *Erickson v. Todd*, 62 S. D. 280, 252 N. W. 879 and *LeZotte v. Lindquist*, 51 S. D. 97, 212 N. W. 503.

Respectfully submitted,

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